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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Applications for Consent)
To the Transfer of Control of Licenses and)
Section 214 Authorizations from)
)
TELE-COMMUNICATIONS, INC.,)
Transferor,)
)
to)
)
AT&T CORP.,)
Transferee.)

CS Docket No. 98-178

To: The Commission

COMMENTS OF CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("C&W USA"), by its attorneys, hereby submits these reply comments on the applications requesting approval of the acquisition by AT&T Corp. ("AT&T") of Tele-Communications, Inc. ("TCI").¹ C&W USA is a major provider of wholesale and retail Internet services, operating one of the largest Internet backbones in the world. C&W USA also is one of the largest long distance carriers in the United States, offering a full range of domestic and international voice, data, and messaging services. As a preeminent Internet services and long distance provider with ongoing plans to integrate and upgrade its networks, C&W USA is particularly interested in transactions such as this which will affect the development of competition in all advanced telecommunications and information services markets.

¹ Applications for Transfer of Control, *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp. Transferee*, CS Docket No. 98-178 (filed Sept. 14, 1998), Description of Transaction, Public Interest Showing, and Related Demonstrations ("Public Interest Statement").

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List A B C D E

C&W USA does not generally oppose the AT&T/TCI merger -- indeed, to the extent that, as the Applicants promise, AT&T's acquisition of and investment in TCI's cable network results in a merged entity that will be in a position to provide local exchange and exchange access services comparable to *and* more technologically advanced than those of the ILECs, C&W USA supports the merger. However, C&W USA is concerned that, without the proper regulatory incentives, the merged AT&T/TCI might unfairly restrict access to its alternative local loop, thereby impeding the growth of competition in all advanced telecommunications and information services markets. Accordingly, C&W USA urges the Commission to acknowledge that, to the extent that it provides local telecommunications services over its broadband cable network, AT&T/TCI will be subject to Title II of the Communications Act and the obligations of all local exchange carriers ("LECs").

Further, the Commission must not lose sight of its responsibilities to promote the rapid development and deployment of all advanced telecommunications and information services. Reasonable and nondiscriminatory access to AT&T/TCI's broadband network for all telecommunications and information services providers is crucial to the development of a competitive market for vertically integrated voice, video, and data services. C&W USA respectfully submits that only an appropriate regulatory classification and the imposition of corresponding procompetitive safeguards, as well as suitable treatment as a vertically integrated provider of advanced services, will ensure that the competitive promise of the proposed merger is realized for all markets.

I. THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION IMPOSE APPROPRIATE CONDITIONS ON AT&T/TCI TO PREVENT THE MERGED ENTITY FROM ERECTING BARRIERS TO ENTRY INTO ADVANCED VOICE, VIDEO, AND DATA MARKETS.

A. The Applicants Must Demonstrate That The Proposed Merger Serves The Public Interest.

Sections 214(a) and 310(b) of the Communications Act require the Applicants to demonstrate to the Commission that their proposed merger serves the public interest.² The public interest standard is both flexible and broad, and generally encompasses “the pro-competitive and de-regulatory national policy framework designed to . . . open[] all telecommunications markets to competition” established by the 1996 Act.³

Specifically, the Commission’s analysis may include a determination of whether the merger will “enhance[] access to advanced telecommunications and information services. . . in all regions of the Nation,”⁴ and also “whether the merger will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers.”⁵ Importantly, the Commission also may consider “the trends within, and the needs of. . . and the nature, complexity and rapidity of change in the telecommunications industry.”⁶

² 47 U.S.C. §§ 214(a), 310(b); *In the Matter of the Merger of MCI Telecommunications Corp. and British Telecommunications PLC*, 12 FCC Rcd 15351, ¶¶ 29 (1997); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, ¶¶ 29, 32. (1997).

³ *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, CC Docket No. 97-211, ¶ 9 (1998) (“*WorldCom/MCI Order*”).

⁴ *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control*, 13 FCC Rcd 15236, ¶ 11 (1998).

⁵ *WorldCom/MCI Order*, ¶ 9.

⁶ *Id.*

Finally, the Commission may as a condition precedent to the merger impose on the parties any reasonable and appropriate conditions consistent with these procompetitive principles that are necessary to safeguard the public interest.

B. Unless The Commission Takes Appropriate Prophylactic Steps, AT&T/TCI Will Be Capable Of Erecting Barriers To Competition In All Advanced Voice, Video, and Data Markets.

AT&T/TCI will occupy a unique market position that fits into the existing statutory scheme, as discussed above, but also anticipates a regulatory framework which has yet to develop and which will contemplate the complete technological integration of telecommunications and information services. AT&T is the nation's largest long distance carrier, and one of the largest providers of mobile wireless and dial-up Internet access⁷; TCI is the nation's largest cable provider, and in many regions the only provider of high-speed Internet access.⁸ The proposed merger generally would result in the combination of AT&T's current consumer long distance, wireless, and Internet service units with TCI's cable, telecommunications, and high-speed Internet businesses, resulting in a mammoth competitor able to provide a full and highly advanced range of vertically integrated local and long distance voice, video, and data services.⁹ AT&T/TCI will be the dominant provider of integrated advanced telecommunications and information services in the country, *and* will control the nation's only high-speed, broadband local network.

If AT&T/TCI is permitted to restrict or bar competitors from integrating access to its broadband network into their telecommunications and information service offerings, entry into

⁷ Public Interest Statement at 2, 5.

⁸ *Id.* at 6-7.

⁹ *Id.* at 11.

advanced services markets will be deterred, technological improvements will be slowed, and consumer choice will be restricted. Until an alternative means of access to consumer homes is both technologically and economically available, competitors of AT&T/TCI will be forced to rely on either AT&T/TCI, or on the less advanced narrowband local networks of the ILECs, for such access. Of course, not only have the ILECs been notoriously recalcitrant regarding reasonable access to their facilities, but, more importantly, the ILEC local loop cannot transport the full range of integrated advanced services as will AT&T/TCI's network.

Thus, the public interest mandates that the Commission ensure that potential competitors of AT&T/TCI in the provision of either packaged or individual voice, video, or data services have access to the millions of residences that will be served by AT&T/TCI's broadband local network. The Commission may accomplish this by requiring AT&T/TCI to offer Internet access services on an unbundled basis, and to provide open access to its broadband network facilities.

II. THE COMMISSION MUST REQUIRE AT&T/TCI TO UNBUNDLE ITS LAST-MILE TRANSPORT FACILITIES AND ITS INTERNET SERVICES AS A CONDITION PRECEDENT TO THE MERGER.

Like several of the commenters, C&W USA is particularly concerned about the Applicants' apparent plan to use their massive combined last-mile transport and Internet service capabilities to erect a "national electronic gateway to the Internet."¹⁰ Integral to the Applicants' ability to accomplish this profoundly anticompetitive goal will be the merged entity's ownership and control of TCI's @Home, which is now one of the nation's leading providers of high-speed Internet access and content services over the cable television infrastructure. The Commission must not permit the merged entity to exploit @Home's existing dominant market position and

¹⁰ See, e.g., America Online Comments at 10; see also MindSpring Enterprises Comments at 17-20; U S West Comments at 11-19.

their unique broadband network to the detriment of competition and choice in the market for Internet services.

TCI operates @Home as a consortium with 18 of the nation's largest multiple cable system operators ("MSOs"). The @Home operating agreement prevents the consortium members and their affiliates from negotiating directly with unaffiliated Internet service providers ("ISPs") for access to their last-mile cable facilities. In order to obtain access to the cable facilities controlled by the consortium MSOs, unaffiliated ISPs must deal with @Home. Thus, effectively, @Home is virtually the only cable-based service Internet option now available to the 58.5 million homes reached by the members' cable systems.¹¹ After the merger is completed and AT&T/TCI has finished upgrading TCI's cable infrastructure and constructing its nationwide broadband local network, as discussed more fully below, @Home will control access to even more homes.

Despite the fact that both AT&T and TCI each have reiterated their dedication to the concepts of competitive neutrality and open access to the broadband network, it is clear that they intend to continue @Home's practice of controlling and, more importantly, burdening competitors' access -- and, correspondingly, consumers' access -- to its broadband transport facilities. Specifically, the Applicants have acknowledged that AT&T/TCI's local network customers who want to receive Internet services from an unaffiliated provider still will be required to subscribe to @Home not only for transport to their desired ISP's site, but also for @Home's content-based services.¹² Clearly, requiring consumers to purchase two Internet

¹¹ See America Online Comments at 8-9.

¹² See *id.* at 9-15.

services to get the *one* service they want neither promotes effective consumer choice nor encourages the entry of new providers into the Internet market.

The Commission must act now in order to ensure that neither consumers nor competing ISPs are harmed as a result of the merger. Accordingly, in order to safeguard consumer choice and competition C&W USA urges the Commission to require AT&T/TCI to offer broadband local transport facilities and Internet services on an unbundled basis.

III. THE COMMISSION MUST ENSURE THAT AT&T/TCI OFFERS ALL COMPETING SERVICE PROVIDERS WITH REASONABLE AND NONDISCRIMINATORY ACCESS TO ITS BROADBAND NETWORK FACILITIES.

A. As A Provider Of Local Telecommunications Services, AT&T/TCI Will Be Subject To Title II Of The Communications Act And All Statutory Obligations Of Local Exchange Carriers.

AT&T's primary motivation for the proposed merger is to "expand and accelerate AT&T's ability to compete with ILECs in providing local telephony service to residential customers."¹³ AT&T intends to accomplish this goal principally through the acquisition of TCI's cable infrastructure, which AT&T plans to upgrade so as to be able to provide advanced, broadband voice, video, and data services.¹⁴ Through TCI's local cable systems, AT&T/TCI will obtain the immediate ability to access over 33 million homes; as a result of its acquisition of Teleport Communications Group, Inc., AT&T already controls the nation's largest facilities-based competitive LEC.¹⁵ And, AT&T will retain ownership of its existing fixed wireless technology and related spectrum rights, which cover over 90 percent of the country. Accordingly, when the proposed transactions and the upgrades to these various local networks

¹³ Public Interest Statement at 13.

¹⁴ *Id.* at 38-39.

¹⁵ *Id.* at 5.

are completed, AT&T/TCI will have constructed and will control the nation's most extensive broadband local network platform.

To the extent that AT&T/TCI provides local telecommunications services over this broadband cable network, it must be subject to Title II of the Communications Act, and, specifically, to the obligations imposed by the Act on all LECs. As several commenters have noted, the Commission has made clear that Title II of the Act applies to the provision of all telecommunications services, regardless of the technology used to provide the service.¹⁶ That is, the fact that AT&T/TCI will provide such services over its cable network rather than a traditional telephone network is irrelevant. In addition, the Applicants have made clear that the merged entity will be providing *local* telecommunications services.

Thus, AT&T/TCI will fall within the orbits both of Section 251(a), which applies to all telecommunications carriers, and of Section 251(b), which applies to all LECs. Accordingly, C&W USA agrees with those commenters who have urged the Commission to require AT&T/TCI to provide to all competitors reasonable and nondiscriminatory interconnection, resale of its service offerings, number portability, dialing parity, and access to rights-of-way, and to establish reciprocal compensation arrangements.¹⁷ Ensuring as a condition of merger that AT&T/TCI complies with these statutory obligations will accomplish the Commission's goals of facilitating the development of competition in both the local and long distance telecommunications markets, thereby preserving the public interest.

¹⁶ See, e.g., MCI WORLDCOM Comments at 5, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, ¶ 993 (1998).

¹⁷ MCI WORLDCOM Comments at 1-4; GTE Comments at 6-7, 12-18; Qwest Communications Corporation Comments at 12-16; U S West Comments at 19-36.

Beyond requiring compliance with Sections 251(a) and (b), the Commission must exercise its statutory authority to condition its approval of the merger on a requirement that AT&T/TCI provide open access to its broadband network to all providers of telecommunications and information services. Specifically, the Commission must require AT&T/TCI to offer reasonable and nondiscriminatory access at reasonable points of interconnection, in accordance with reasonable and nondiscriminatory network standards, to the cable and other local network facilities used by AT&T/TCI, to the extent that it provides *either* telecommunications or information services over those facilities, at cost-based, reasonable, and nondiscriminatory rates. This open access condition should encourage the growth of competition not only in telecommunications markets, but in advanced video and data markets as well.

B. The Commission Should Monitor Carefully And Impose On AT&T/TCI Any Additional Procompetitive Obligations That May Become Necessary.

C&W USA appreciates the concerns of the many commenters that have suggested that the Commission impose on AT&T/TCI not only the obligations imposed on local telecommunications carriers by the Communications Act, but also those requirements to which incumbent LECs ("ILECs") are subject -- including the resale, unbundling, and interconnection provisions of Section 251(c).¹⁸ At this time, however, C&W USA is not entirely convinced that AT&T/TCI's position in the local markets, dominant though it will be, will rise to the level of incumbency. Thus, C&W USA believes that compliance with Sections 251(a) and (b), combined with the open access requirement discussed below, should be sufficient both to safeguard and to encourage competition in the local and long distance voice, video, and data markets.

¹⁸ See, e.g., GTE Comments at 6-7, 12-18; Qwest Communications Corporation Comments at 12-16; U S West Comments at 19-36.

It is, though, possible that AT&T/TCI's market position and behavior could change at any time -- and particularly after the completion of the cable network's upgrade and AT&T/TCI begins to provide a full range of integrated services. Accordingly, C&W USA urges the Commission to monitor AT&T/TCI's actions carefully, and to be ready to impose any additional procompetitive obligations that may become necessary.

CONCLUSION

For the foregoing reasons, C&W USA urges the Commission to approve the proposed merger only after ensuring that AT&T/TCI will be unable to exploit its new, enhanced capabilities so as to erect anticompetitive barriers to entry into the markets for local or long distance advanced voice, video, or data services. Thus, the Commission must require AT&T/TCI to comply with the obligations imposed by the Communications Act on all local telecommunications carriers. Further, as soon as it offers its customers *any* telecommunications or information service over its broadband local network, AT&T/TCI must be required to offer open access to that network to all competing providers of that service. The public interest can be served only if all providers of advanced telecommunications and information services can compete on a level playing field with regard to the new broadband network promised by the proposed transaction.

Respectfully submitted,

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November 13, 1998

CERTIFICATE OF SERVICE

I, Rebekah J. Kinnett, hereby certify that on this 13th day of November, 1998 copies of the foregoing Reply Comments of Cable & Wireless USA, Inc. were served by first-class mail, postage prepaid, or by hand, on the following:

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